CORRECTED COPY

Supreme Court, U.S.
FILED
JAN 27 1992
OFFICE OF THE CLERK

No. 91-1225

In The

Supreme Court of the United States

October Term, 1991

MIDNIGHT SESSIONS, LTD. t/a AFTER MIDNIGHT, BAKER OCEAN, INC. t/a DOWN SOUTH, GOOD TIMES CAFE, INC., DONALD R. WELCH, SALLY HUNTER, JACK MANOFF, RICHARD SINGER and CURT E. HEIDINGER,

Petitioners,

vs.

CITY OF PHILADELPHIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PAUL A. LOGAN
Counsel of Record
MICHAEL G. TRACHTMAN
ETHAN N. HALBERSTADT
POWELL, TRACHTMAN, LOGAN
& CARRLE, P.C.
Attorneys for Petitioners
367 South Gulph Road
King of Prussia, Pennsylvania 19406
(215) 354-9700

1545
Lutz Appellate Printers, inc. • NJ (908) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

QUESTIONS PRESENTED

1. Where a property owner obtains building and zoning permits for a specific use, completes construction and is granted a certificate of compliance with all codes and ordinances, does a municipality violate the property owner's right to due process when it subsequently prohibits the property owner's use of the completed project on the basis of an undisclosed, standardless municipal policy requiring neighborhood approval of the project?

2. Must a municipality act with an improper motive in enforcing an arbitrary and irrational municipal policy in order to be held liable pursuant to 42 U.S.C. § 1983?

3. Is a municipality's denial of a land use license a "final decision" for purposes of determining whether a substantive due process challenge is ripe under 42 U.S.C. § 1983?

4. Does arbitrary government action which deprives a person of a leasehold interest in property constitute a taking of property for which compensation is due?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Jurisdictional Statement 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 4

Reasons for Granting the Writ 11

I. The Third Circuit's decision that a municipality may require a property owner to complete a construction project and then require the property owner to satisfy an unwritten, undisclosed, standardless policy requiring neighborhood approval is in conflict with decisions of this Court and other Circuit Courts. 11

II. The Third Circuit's decision that a municipality which acts arbitrarily and irrationally must also act with an "improper motive" before liability may attach pursuant to Section 1983 is contrary to decisions of this Court and other Circuit Courts. 14

Contents

Page

III. The Third Circuit's decision that the denial of a land use license does not constitute a final decision for evaluating substantive due process claims effectively eliminates the rule that a civil rights litigant need not exhaust its administrative remedies. 16

IV. The Third Circuit's decision that arbitrary government action that deprives a person of a leasehold interest in property is not a taking for which compensation is due is not in accordance with decisions of this Court. 18

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Alamo Land & Cattle Co., Inc. v. Arizona, 424 U.S. 295 (1976) 19

Allison v. Wilson, 434 F.2d 646 (9th Cir. 1970), cert. denied, 404 U.S. 863 14

Armstrong v. Manzo, 380 U.S. 545 (1965) 13

Barnes v. Merritt, 428 F.2d 284 (5th Cir. 1970) 12

City of Canton v. Harris, 489 U.S. 381 (1989) 15

Daniels v. Williams, 474 U.S. 327 (1986) 15

Eubank v. City of Richmond, 226 U.S. 137 (1912) 11, 12

Contents

Page

First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 19

General Electric Company v. New York State Department of Labor, 936 F.2d 1448 (2d Cir. 1991) 12

Geo-Tech Reclamation Industries, Inc. v. Hambrick, 886 F.2d 662 (4th Cir. 1989) 12

Kerr v. Chicago, 424 F.2d 1134 (7th Cir. 1970) 14

Keystone Bituminous Coal Ass'n v. Duncan, 771 F.2d 707 (3d Cir. 1985), aff'd, 480 U.S. 470 (1987) 18

Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982) 13

McCollum v. City of Powder Springs, 720 F. Supp. 985 (N.D. Ga. 1989) 12

Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667 (3d Cir. 1991) 13, 14, 17, 18

Monell v. New York City Department of Social Services, 436 U.S. 458 (1978) 14, 15

Monroe v. Pape, 365 U.S. 167 (1961) 14, 15

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 15

Parratt v. Taylor, 451 U.S. 527 (1981) 13

Contents

Page

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 16

Pembaur v. Cincinnati, 475 U.S. 469 (1986) 15

Raper v. Lucey, 488 F.2d 748 (5th Cir. 1973) 12

Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971), cert. denied, 404 U.S. 866 14

Smithfield Concerned Citizens v. Town of Smithfield, 907 F.2d 239 (1st Cir. 1990) 17

St. Louis v. Praprotnik, 485 U.S. 112 (1988) 15

United States v. Petty Motor Co., 327 U.S. 372 (1946) 19

Washington ex rel Seattle Title Trust Company v. Roberge, 278 U.S. 116 (1928) 11, 12

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 16, 17

Statutes Cited:

18 U.S.C. § 1961, et seq. 10

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 9

Contents

Page

28 U.S.C. § 1343 9

42 U.S.C. § 1981 10

42 U.S.C. 1982 10

42 U.S.C. § 1983 .....i, 3, 4, 9, 14, 15, 16, 17, 18

42 U.S.C. 1985 10

42 U.S.C. 1986 10

42 U.S.C. 1988 .....2, 10

53 P.S. §§ 4731-4742 .....4, 5, 7

United States Constitution Cited:

Fifth Amendment 2, 3

Fourteenth Amendment, Section 1 .....3, 11, 12

Rule Cited:

Supreme Court Rule 29.1 6

No. 91-1225

In The

Supreme Court of the United States

October Term, 1991

MIDNIGHT SESSIONS, LTD., t/a AFTER MIDNIGHT, BAKER OCEAN, INC., t/a DOWN SOUTH, GOOD TIMES CAFE, INC., DONALD R. WELCH, SALLY HUNTER, JACK MANOFF, RICHARD SINGER, and CURT E. HEIDINGER,

Petitioners,

vs.

CITY OF PHILADELPHIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Greenberg, J.) is reported at 936 F.2d 1448 (3d Cir. 1991), and is reprinted in the appendix at 1a. The Third Circuit's order

denying petitioners' petition for rehearing is unreported, and is reprinted in the appendix at p. 48a.

The memorandum and order of the United States District Court for the Eastern District of Pennsylvania (Newcomer, J.) denying respondent's motion for the entry of judgment notwithstanding the verdict, for a new trial, and to alter, amend, or remit the judgment, is not reported, and is reprinted in the appendix at p. 50a.

The memorandum and order of the United States District Court for the Eastern District of Pennsylvania (Newcomer, J.) denying in part and granting in part respondent's motion for summary judgment, is not reported, and is reprinted in the appendix at p. 64a.

The memorandum and order of the United States District Court for the Eastern District of Pennsylvania (Newcomer, J.), awarding petitioners' attorney's fees pursuant to 42 U.S.C. § 1988, is reported at 755 F. Supp. 652 (E.D. Pa. 1991), and is reprinted in the appendix at p. 97a.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254(1). The judgment sought to be reviewed was entered by the United States Court of Appeals for the Third Circuit on October 2, 1991. Rehearing was subsequently denied by order dated October 28, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1 of the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Civil Rights Act, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

> privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceedings for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

Pennsylvania's Dance Hall Act, 53 P.S. §§ 4731-4742, 1919, May 16, P.L. 193, is reproduced in the appendix at page 124a, due to its length.

STATEMENT OF THE CASE

The focus of this civil rights action is an unwritten municipal policy which regulates the issuance of "dance hall licenses" in the City of Philadelphia. Pursuant to this unwritten policy, an application for a dance hall license cannot be submitted to the City until the dance hall is fully constructed and the applicant has obtained a certificate of occupancy confirming compliance with all codes and ordinances. (R. 169a-173a, 222a). The applicant is then subjected to a standardless neighborhood approval process, whereby the applicant must obtain the consent of its neighbors before the City will issue the license. The applicant is never put on notice that neighborhood approval is a prerequisite to the issuance of the license.

The City delegates the responsibility for conducting this neighborhood approval process to its police department, which thereafter recommends to the City's Department of Licenses and Inspections ("L&I") whether the dance hall license should issue. L&I follows the police recommendation in all instances, even though the City Home Rule Charter requires L&I, the department charged with ensuring the satisfaction of building, health, and safety requirements, to rule on the issuance of all dance hall license

applications. (R. 174a, 175a, 204a, 217a-220a, 225a).

The police formulate their recommendation through a neighborhood "survey", which consists of randomly knocking on five or ten doors in the neighborhood and asking those who answer if they object to the now-completed dance hall. (R. 205a-206a, 210a-211a). There are absolutely no standards to guide the police in conducting this survey, even though the City's Home Rule Charter requires the City to promulgate written standards for the grant or denial of a dance hall license. (R. 181a-182a). There is nothing which tells the police who to interview, how many people to interview, what to ask, and on what to base a positive or negative recommendation. (R. 180a, 181a-182a, 207a, 219a-220a). If even a few people object to the proposed dance hall — for good, bad or no reasons — the police recommend against the dance hall without analyzing issues of public health or safety, or compliance with law. (R. 176a-179a, 197a, 207a).

This unwritten municipal policy was purportedly adopted in furtherance of the City's investigative responsibilities pursuant to a 1919 Pennsylvania law known as the "Dance Hall Act," 53 P.S. §§ 4731-4732. Under the Dance Hall Act, the mayor of each city is required to investigate whether the proposed dance hall "complies with the rules, regulations, ordinances and laws applicable thereto". 53 P.S. § 4735. Furthermore, the Dance Hall Act states that no dance hall license shall be issued until it is ascertained "that the place for which it is issued complies with and conforms to all laws, ordinances, health and fire regulations, applicable thereto, and is a safe and proper place for the purpose for which it shall be used, properly ventilated and supplied with sufficient toilet conveniences." 53 P.S. § 4736.

Petitioners[1] sought to open two nightclubs in the City of Philadelphia, the linchpin of which was dancing to "rap" music. One nightclub, known as "After Midnight", was to be located in a dilapidated warehouse situated in an industrially-zoned area that permitted uses ranging from locomotive factories, to breweries, to meat-rendering facilities. Building and zoning permit applications, filed by petitioners and approved by the City, disclosed the *raison d'etre* of After Midnight to be "dancing" and included plans for a 12,000 square foot dance floor. (R. 132a-137a, 230a-243a). The other nightclub, known as "Down South", was to be located in a commercial area of the City where many nightclubs and bars were located, in the premises of an existing, licensed nightclub. (R. 162a, 214a). Petitioners sought and obtained the City's permission to renovate Down South, including a substantial enlargement of its dance floor.

After Midnight required extensive renovation and construction. Shortly after petitioners began this work, petitioners attempted to submit an application for their dance hall license in accordance with published City procedures. L&I refused to accept the application, advising petitioners that City policy required them to first obtain a certificate of occupancy. In order to obtain the certificate of occupancy, petitioners were required to complete all construction and satisfy all City codes and ordinances relating to building practices, health and safety. (R. 137a-138a, 169a-173a, 222a).

Believing that a dance hall license was a formality once City codes and ordinances were satisfied, petitioners thereafter spent

---

1. Neither Midnight Sessions, Ltd., Baker Ocean, Inc., nor Good Times Cafe, Inc. has parent companies, subsidiaries, or affiliates to list pursuant to Supreme Court Rule 29.1.

over $1,000,000.00 in renovation and construction costs to complete After Midnight, and received their certificate of occupancy. At no time — before, during or after its operation — was After Midnight charged with a violation of any code or ordinance relating to health or safety. (R. 139a-140a, 141a-142a, 184a, 225a, 244a).

Petitioners then submitted their dance hall license application, as instructed. The City conceded that petitioners satisfied all objective criteria set forth in the Dance Hall Act, but denied the dance hall license on the basis of the police department's negative recommendation, which was predicated solely on "neighborhood objections". (R. 141a-146a, 152a-154a, 156a, 175a, 186a, 181a-182a, 223a-224a). Until this time, petitioners were unaware that the dance hall license could be denied on the basis of neighborhood objections; in fact, they had been told by City officials in a prior dance hall license proceeding that neighborhood approval was not a prerequisite to a dance hall license. (R. 130a, 131a, 147a-148a).

Although the City provided plaintiffs with a right of appeal to its Board of License and Inspection Review, there were no published guidelines or criteria regarding what the Board of License and Inspection Review considered. (R. 181a, 188a, 201a-202a, 202a-203a). Meanwhile, the City's Law Department and other City officials held private meetings with petitioners' neighborhood opponents, who had gained the ear of a prominent City councilman, advising them (but not the petitioners) that the Board would be influenced by vociferous shows of community opposition. (R. 147a-148a, 182a-184a, 228a). Consequently, at the Board hearing in May 1988, 50-60 sign-carrying opponents conducted a demonstration, while petitioners sat alone, expecting the hearing to focus on compliance with law. The Chairman of the Board later testified that his show of opposition, unmatched by a similar show of support, was highly influential in the Board's

denial of the plaintiffs' appeal. (R. 149a, 189a-195a). It was not until December 1988 that After Midnight was granted another hearing before the Board. Now knowing the unwritten "rules of the game", petitioners brought their proponents and, resultantly, got their license, more than seven months after their original application. (R. 157a-159a).

This delay caused After Midnight to go out of business. During this period, petitioners were permitted to invite patrons to listen to music, but were required — under the watchful eye of City inspectors — to prohibit dancing. Consequently, After Midnight's customers went elsewhere, petitioners fell behind in their rent, filed for bankruptcy, and were evicted, losing their building rehabilitation investment in the process. (R. 153a-154a, 212a-213a, 159a-161a, 216a).

Down South suffered a similar fate. Petitioners originally opened Down South in early July 1988, through a separate corporation. It did not feature "rap" music, and operated for a few weeks, without City interference. (R. 164a-165a). Thereafter, petitioners thought they might be able to attract the many customers that had patronized After Midnight, now closed, if they changed to a "rap" format and advertised that Down South was "from the people who brought you After Midnight". The strategy worked, and Down South became a highly successful business. (R. 165a-166a, 215a).

Only then — when the connection between Down South and After Midnight became public — did the aforementioned City councilman become involved, telling the media that he would close Down South because it had "no redeeming social value". (R. 198a, 200a, 226a-227a). Immediately thereafter, despite having passed all prior City inspections, Down South received violation notices from L&I. (R. 199a-200a). The Chief of L&I's License Issuance Unit, Robert D'Agostino, told the press that the violations

were "minor". (R. 187a). A short time later, however, on October 7, 1988, Mr. D'Agostino inexplicably told the petitioners that his Department was going to close Down South *that night,* with no prior notice or opportunity to be heard, as the result of these "minor" violations. (R. 164a-165a).

Petitioners advised Mr. D'Agostino that they disagreed with the violations with which they were charged — as recently as January 1988, Down South's predecessor had passed all City inspections, despite the same conditions for which Down South was now being cited. (R. 167a-419a). Petitioners advised L&I that if they were permitted to operate, they could afford to make the changes but, otherwise, they would be forced to go out of business. Mr. D'Agostino refused the request. (R. 167a-168a).

As the final nail in Down South's coffin, the City advised plaintiffs on October 14, 1988 that Down South's dance hall license would not be continued in effect for but one reason — "objection of neighbors". (R. 163a, 186a). Petitioners, now out of money, were unable to continue the fight. (R. 167a-168a, 216a).

Petitioners brought suit in the district court[2] pursuant to 42 U.S.C. § 1983, alleging that the City violated petitioners' substantive and procedural due process rights, and that the City's conduct resulted in an unconstitutional taking of petitioners'

---

2. Subject matter jurisdiction in the district court was predicated on 28 U.S.C. §§ 1331 and 1343. Petitioners originally brought suit against the City and numerous City officials. At trial, the City entered into a court approved stipulation with petitioners whereby the jury would be charged that the City was legally responsible for all acts and omissions of each member of the Board of License and Inspection Review, and individual defendants John Plonski, Robert D'Agostino, Clarence Mosley, and Cureley Cole, Esq. The City further agreed that it would make no contrary argument or contention on appeal, or in any subsequent proceedings. In return, petitioners agreed to dismiss all claims against the individual defendants.

property.[3] Shortly before trial, the district court, per the Honorable Clarence C. Newcomer, denied the City's motion for summary judgment with respect to these claims.

The jury returned a verdict in favor of petitioners on all three claims, awarding $2,553,000.00 in damages to After Midnight and $522,000.00 to Down South.[4] The district court thereafter denied the City's motion for the entry of judgment notwithstanding the verdict, for a new trial, and to alter, amend, or remit the judgment. The district court also awarded attorney's fees to petitioners as prevailing parties pursuant to 42 U.S.C. § 1988.

On appeal, the Court of Appeals for the Third Circuit reversed the district court's denial of respondent's motion for a judgment notwithstanding the verdict on the issues of taking without just compensation, procedural due process, and Down South's substantive due process claim. With respect to After Midnight's substantive due process claim, however, the Third Circuit reversed and remanded for a new trial. The district court's award of attorney's fees was vacated.

On October 28, 1991, the Third Circuit denied rehearing.

---

3. Petitioners also advanced claims pursuant to 42 U.S.C. §§ 1981, 1982, 1985 and 1986 and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* The district court dismissed the 42 U.S.C. §§ 1985 and 1986 claims and RICO claim before trial.

4. The jury found for the City on petitioners' claims under 42 U.S.C. §§ 1981 and 1982.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S DECISION THAT A MUNICIPALITY MAY REQUIRE A PROPERTY OWNER TO COMPLETE A CONSTRUCTION PROJECT AND THEN REQUIRE THE PROPERTY OWNER TO SATISFY AN UNWRITTEN, UNDISCLOSED, STANDARDLESS POLICY REQUIRING NEIGHBORHOOD APPROVAL IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS.

This Court has consistently interpreted the Fourteenth Amendment to the United States Constitution as prohibiting the government from regulating private land use with standardless, neighborhood approval procedures. *See Washington ex rel Seattle Title Trust Company v. Roberge,* 278 U.S. 116 (1928); *Eubank v. City of Richmond,* 226 U.S. 137 (1912). Such schemes violate due process because they impermissibly delegate land use decisions to private individuals, who are free to arbitrarily deny an otherwise lawful land use for any reason, including self interest, bias, or unarticulated "not-in-my-backyard" sentiments. The Third Circuit not only endorsed this method of land use regulation, but also found that a property owner need not be put on notice of the scheme, after the property owner is induced to spend the funds required to complete what he is then forbidden to use.

In *Eubank, supra,* this Court struck down a Richmond ordinance that required the city's Building Committee to establish set-back lines for a given piece of property whenever requested to do so by two-thirds of the adjacent property owners. This Court reasoned that the ordinance violated due process because it conferred "the power on some property holders to virtually control and dispose of the property rights of others" and created no

standard by which the adjacent property owners were to exercise this power. The adjacent property owners' decision could be based on their own self interest, or be totally capricious. *Eubank,* 226 U.S. at 143-44.

Similarly, in *Roberge, supra,* this Court struck down a Seattle zoning ordinance that allowed a home for the aged poor to be built in a particular area, but only if the consent of other property owners near the proposed building was first obtained. *Roberge,* 278 U.S. at 118. This Court reasoned that the decision of the nearby property owners was uncontrolled by any standard or rule prescribed by legislative action. Under the ordinance, the adjacent property owners were free to withhold their consent for selfish, arbitrary or capricious reasons. This Court found this system of land use regulation "repugnant to the due process clause of the Fourteenth Amendment." *Id.* at 121-22.

The Second and Fourth Circuits have recently reaffirmed the vitality of the *Eubank* and *Roberge* decisions. *See General Electric Company v. New York State Department of Labor,* 936 F.2d 1448 (2d Cir. 1991); *Geo-Tech Reclamation Industries, Inc. v. Hambrick,* 886 F.2d 662 (4th Cir. 1989).

Aside from the clear mandate of *Eubank* and *Roberge,* the City's failure to put petitioners on notice of its neighborhood objection policy is itself repugnant to all notions of due process. *See Raper v. Lucey,* 488 F.2d 748, 752 (5th Cir. 1973); *Barnes v. Merritt,* 428 F.2d 284 (5th Cir. 1970); *McCollum v. City of Powder Springs,* 720 F. Supp. 985 (N.D.Ga. 1989). This is especially true where, as here, petitioners were required to expend over $1,000,000.00 before they were even permitted to submit a license application. The City's unwritten policy is thus both substantively and procedurally infirm.

The Third Circuit held that the post deprivation appeal

procedures available to petitioners satisfied procedural due process. *See Midnight Sessions, Ltd v. City of Philadelphia,* 945 F.2d 667 (3d Cir. 1991). However, this Court has held that post deprivation remedies do not satisfy due process where predeprivation process is feasible. *Logan v. Zimmerman Brush Company,* 455 U.S. 422, 436 (1982). The record is clear that the City could easily have provided petitioners with notice of the neighborhood approval process, and with the neighbors' determination, *before* forcing petitioners to complete construction. In fact, the City has since changed its procedure, and presently accepts the applications without requiring the applicant to first complete construction. (R. 196a). Under these circumstances, where the deprivation arose as a result of an established City procedure, the post deprivation remedies available to petitioners were wholly inadequate to satisfy due process. *See Logan,* 455 U.S. at 436; *compare Parratt v. Taylor,* 451 U.S. 527, 545 (1981). The process which was ultimately afforded petitioners was not granted at a meaningful time or, for that matter, in a meaningful manner.[5] *See Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

The Third Circuit's decision to uphold a system of land use regulation so patently repugnant to the due process clause, in disregard of established precedent, merits review by this Court.

---

5. It is difficult to descern how the post deprivation process obtained by petitioners was in any respect "meaningful," as petitioners were never put on notice of the requirements necessary to obtain the licenses, even on appeal.

II.

THE THIRD CIRCUIT'S DECISION THAT A MUNICIPALITY WHICH ACTS ARBITRARILY AND IRRATIONALLY MUST ALSO ACT WITH AN "IMPROPER MOTIVE" BEFORE LIABILITY MAY ATTACH PURSUANT TO SECTION 1983 IS CONTRARY TO DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS.

The Third Circuit held that the City could not be liable for implementing its unwritten, undisclosed neighborhood objection policy unless the jury found that the City had acted with an "improper motive." *Midnight Sessions,* 945 F.2d at 685. Never before has this Court required a civil rights litigant to prove that a municipality acted with an "improper motive" in enforcing a constitutionally infirm policy in order to establish liability under 42 U.S.C. § 1983.

In *Monroe v. Pape,* 365 U.S. 167 (1961), *overruled on other grounds, Monell v. New York City Department of Social Services,* 436 U.S. 458 (1978), this Court held that specific intent need not be proven in order to create liability under § 1983. This Court reasoned that § 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. *Monroe,* 365 U.S. at 187.

Until the Third Circuit's decision, the Circuit Courts uniformly applied the rule set forth in *Monroe.* Thus, in *Roberts v. Williams,* 456 F.2d 819, 826 (5th Cir. 1971), *cert. denied,* 404 U.S. 866, the Fifth Circuit specifically held that "improper motive is not a prerequisite to suit under § 1983." *See also Kerr v. Chicago,* 424 F.2d 1134, 1140 (7th Cir. 1970); *Allison v. Wilson,* 434 F.2d 646, 647 (9th Cir. 1970), *cert. denied,* 404 U.S. 863.

In *Monell, supra,* this Court overruled *Monroe* to the extent

that it held that a municipality could not be held liable under § 1983. *Monell* held that municipal liability could exist where a municipal policy caused the deprivation of a person's constitutional rights. *Monell,* 436 U.S. at 692. However, *Monell* did not alter the *Monroe* holding that specific intent is not a prerequisite to liability under § 1983.

Since *Monell,* this Court has had numerous opportunities to more fully develop the contours of municipal liability under § 1983. Nonetheless, this Court has never held that a municipality must act with an "improper motive" in adopting a policy or custom which deprives a person of constitutional rights.[6] To the contrary, this Court has made clear that where, as here, the policy or custom is itself unconstitutional and causes the deprivation of constitutional rights, municipal liability attaches. *See Monell,* 436 U.S. at 692; *City of Canton, supra* (rejecting the argument that municipal liability only attaches where the municipal policy in question is itself unconstitutional); *Daniels v. Williams,* 474 U.S. 327, 329 (1986) (§ 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right").

The Third Circuit's decision signals a dangerous, new rule of law in which a municipality can only be held liable if it enforces

---

6. Virtually all of these cases address the issue whether a municipal policy or custom existed which caused the constitutional deprivation. *See Pembaur v. Cincinnati,* 475 U.S. 469, 483-484 (1986) ("municipal liability under § 1983 attaches where . . . a deliberate choice to follow a course of action is made from among various alternative" by city policy makers); *St. Louis v. Praprotnik,* 485 U.S. 112 (1988); *Oklahoma City v. Tuttle,* 471 U.S. 808 (1985); *City of Canton v. Harris,* 489 U.S. 381 (1989) (municipal liability may attach under § 1983 "where the city's failure to train [its police officers] reflects deliberate indifference to the constitutional rights of its inhabitants"). There is no dispute in the case *sub judice* that the neighborhood objection policy was adopted by the City of Philadelphia.

an unconstitutional policy with an "improper motive". Review of the Third Circuit's decision is necessary to clarify this area of law, and to reaffirm the long standing rule that "improper motive", or specific intent, is not a prerequisite to liability pursuant to § 1983.

III.

THE THIRD CIRCUIT'S DECISION THAT THE DENIAL OF A LAND USE LICENSE DOES NOT CONSTITUTE A FINAL DECISION FOR EVALUATING SUBSTANTIVE DUE PROCESS CLAIMS EFFECTIVELY ELIMINATES THE RULE THAT A CIVIL RIGHTS LITIGANT NEED NOT EXHAUST ITS ADMINISTRATIVE REMEDIES.

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985) this Court held that there must be a final decision made by a government entity which denies a person all reasonable use of the property before a taking claim is ripe for review under the Fifth Amendment. This Court carefully explained the important distinction between this "finality requirement" and the requirement that a litigant exhaust its administrative remedies. The finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Id.* at 193.

This distinction is of the utmost importance because a civil rights litigant is not required to exhaust its administrative remedies before bringing suit. *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982). Thus, in *Williamson,* this Court specifically ruled that

the property owner *would not* be required to appeal a planning commission's rejection of a preliminary property plat to a "Board of Zoning Appeals" because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking. *Williamson,* 473 U.S. at 193. However, the property owner's claim was found to be premature because it had not attempted to obtain variances which would have allowed a beneficial use of the property. *Id.* at 194.

The Third Circuit ruled that Down South's substantive due process challenge never ripened for review because "Down South did not appeal to the Review Board the citations for violations it received from [Licenses & Inspections] thereby precluding "final administrative actions" by the City. *Midnight Sessions,* 945 F.2d at 686. This analysis inextricably links and confuses the final decision rule of *Williamson* and the exhaustion of administrative remedies doctrine.

The review procedures referred to by the Third Circuit were clearly remedial in nature — like those of the Board of Zoning Appeals in *Williamson* — and therefore were nothing more than administrative remedies. The Third Circuit thus effectively held that Down South was required to exhaust its administrative remedies before pursuing its substantive due process claim, in direct conflict with rulings of this Court.

Moreover, even though the final decision rule articulated in *Williamson* is, by its very nature, confined to the Fifth Amendment taking claims, the Third Circuit extended the rule to include all substantive due process cases brought pursuant to § 1983. Nothing in *Williamson,* or this Court's decisions after *Williamson,* have imposed this final decision rule outside the context of claims brought under the Fifth Amendment. *See Smithfield Concerned Citizens v. Town of Smithfield,* 907 F.2d 239 (1st Cir. 1990) (landowners not required to satisfy *Williamson* final decision rule

in order to bring substantive due process challenge).

Review by this Court is necessary to prevent the evisceration of the rule that administrative remedies need not be exhausted before bringing suit under § 1983, and to prevent the expansion of the final decision rule into all areas of substantive due process.

IV.

THE THIRD CIRCUIT'S DECISION THAT ARBITRARY GOVERNMENT ACTION THAT DEPRIVES A PERSON OF A LEASEHOLD INTEREST IN PROPERTY IS NOT A TAKING FOR WHICH COMPENSATION IS DUE IS NOT IN ACCORDANCE WITH DECISIONS OF THIS COURT.

The Third Circuit held that there could not be a taking of property for which compensation was due because the City's actions did not preclude After Midnight from using its property "as an arcade, restaurant, roller rink, and movie theater." *Midnight Sessions,* 945 F.2d at 677. Relying upon the factors set forth in *Keystone Bituminous Coal Ass'n v. Duncan,* 771 F.2d 707, 715 (3d Cir. 1985), *aff'd,* 480 U.S. 470 (1987), the Third Circuit reasoned that a taking is simply not established upon the showing of the denial of the ability to exploit a property interest believed to be available. *Midnight Sessions,* 945 F.2d at 676.

In reviewing the record on appeal, however, the Third Circuit failed to view the record in a light most favorable to petitioners herein, who prevailed on their taking claim in the district court. The evidence at trial established that After Midnight was built specifically for use as a dance hall, and could not remain economically viable without dancing, despite its best efforts. (R. 153a-154a, 212a-213a). Most importantly, the Third Circuit overlooked the fact that After Midnight was evicted from the premises by its landlord for nonpayment of rent, thereby depriving

petitioners of their leasehold interest in the property, and the valuable improvements thereto. (R. 159a-161a, 216a-217a).

This Court has long held that the deprivation of a leasehold interest in property by the government may amount to a taking of property for which compensation is due under the Fifth Amendment. *See Alamo Land & Cattle Co., Inc. v. Arizona,* 424 U.S. 295 (1976); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *see also First Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987) (government may be liable for regulatory, temporary taking of property). The Third Circuit not only failed to recognize that petitioners' suffered the complete deprivation of their leasehold interest, in so doing they also failed to recognize that this deprivation is of constitutional proportions.

Review of the Third Circuit's decision is necessary to correct this error of law, and to confirm that a government entity must pay due compensation to a lessee who is deprived of its leasehold interest by virtue of arbitrary and capricious government regulation.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

PAUL A. LOGAN
Counsel of Record
MICHAEL G. TRACHTMAN
ETHAN N. HALBERSTADT
POWELL, TRACHTMAN,
LOGAN & CARRLE, P.C.
Attorneys for Petitioners